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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Puente, an Arizona nonprofit corporation;)	No. CV 18-2778-PHX-JJT
Poder in Action, an Arizona nonprofit)	
corporation, et al.)	
)	MOTION TO UNSEAL EXHIBIT 149
Plaintiffs,)	TO PLAINTIFFS' MOTION FOR
)	PARTIAL SUMMARY JUDGMENT,
v.)	DOC 246
)	
City of Phoenix, a municipal corporation,)	
et al.)	
)	(Hon. John J. Tuchi)
Defendants.)	
))	

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1 Plaintiffs move for an order unsealing Exhibit 149 to Plaintiffs' Motion for Partial
2 Summary Judgment (Doc. 246), previously filed under seal pursuant to Plaintiffs' Motion
3 to Seal (Doc. 256). Exhibit 149 contains a screenshot of a Facebook post made by
4 Phoenix Police Sergeant Douglas McBride related to a "challenge coin" that Phoenix
5 Police officers produced and distributed in connection with their unconstitutional and
6 violent actions on August 22, 2017. *See* Doc. 246 at 14.

7
8 In May 2020, Plaintiffs notified Defendants that they intended to cite to and file
9 Exhibit 149 in support of their Motion for Partial Summary Judgment. Defendants
10 deemed the exhibit "Confidential or Confidential – For Counsel Eyes Only" pursuant to
11 the Protective Order (Doc. 56) because Defendants believed that the exhibit "contain[ed]
12 private personal information" and requested that Plaintiffs file Exhibit 149 under seal.
13 *See* Doc. 256 at 4.

14 If there were previously any privacy interest that justified filing Exhibit 149 under
15 seal, that interest has dissipated, and there is no longer any sufficiently compelling
16 justification for overriding the strong presumption in favor of public access to Exhibit
17 149. Specifically, recent public interest in the exhibit's contents as a result of widespread
18 news coverage relating to the challenge coin's hate message, Sergeant McBride's
19 placement on the "Brady" list for providing false testimony to a grand jury, and the City
20 Manager's reporting on a Ballard Spahr LLP investigation into the challenge coin
21 eliminate Defendants' purported good faith reasons for maintaining the exhibit under
22 seal.¹

23
24 **I. BACKGROUND**

25 At around 8:30 p.m. on Tuesday, August 22, 2017, Sergeant Douglas McBride of
26 the Phoenix Police Department ("PPD") ordered officers to disperse hundreds of peaceful

27 ¹ On August 18, 2021, Plaintiffs requested that Defendants provide their positions on this
28 motion. Despite Plaintiffs' multiple attempts to follow up on this request, to date,
Defendants have not provided their positions.

1 protesters by firing hundreds of rounds of chemical and impact munitions into the crowd
2 without notice or warning. Three days later, on August 25, 2017, Sergeant McBride
3 posted an image on his Facebook page related to the protest and PPD's violent actions
4 against the protesters. Exhibit 149 shows Sergeant McBride's Facebook post.

5 Defendants designated Exhibit 149 "CONFIDENTIAL" pursuant to the Protective
6 Order, which allows that designation if the designating party

7 believes in good faith that the information. . . contains confidential
8 information that the party or producing party would not ordinarily disclose,
9 that is not subject to disclosure under applicable public records laws, and
10 that should be protected from disclosure pursuant to this Order and any
11 controlling federal or state statutory or case law; controlling state law;
12 controlling judicial or administrative order; Federal Rule of Civil
13 Procedure; or Local Rule for the District Court for the District of Arizona.

14 Doc. 56 at 3.²

15 Plaintiffs filed Exhibit 149 under seal, citing Defendants' reason for sealing. *See*
16 generally Doc. 256. Since then, there has been an explosion in public interest concerning
17 the challenge coin, which is the subject of Exhibit 149. For example, in early 2021,
18 ABC15 reported:

19 After shooting a protester in the groin, a special team of Phoenix Police
20 officers celebrated the shot with commemorative coins to sell and share.
21 The "challenge coins" clearly depict the man being shot on the front and
22 have the date of the protest on the back, according to images and photos
23 obtained by ABC15. . . . The coins also have the following two phrases:
24 "GOOD NIGHT LEFT NUT" and "MAKE AMERICA GREAT AGAIN
25 ONE NUT AT A TIME."³

26 The phrase "GOOD NIGHT LEFT NUT" received widespread public attention due, at

27 ² Plaintiffs do not believe there is now or ever was a good-faith basis to designate Exhibit
28 149 "CONFIDENTIAL – FOR COUNSEL EYES ONLY" under the Protective Order.
See Doc. 56 at 3.

³ Dave Biscobing, *Phoenix Police Officers' Trophy Celebrates Shooting Man In Groin During Protests*, ABC15 (Feb. 5, 2021, 9:45 PM), <https://www.abc15.com/news/local-news/investigations/protest-arrests/phoenix-police-department-trophy-celebrates-shooting-man-in-groin-during-protests>.

1 least in part, to its similarity to the neo-Nazi slogan “Good Night, Left Side,” a phrase
2 that is used to demonstrate readiness to commit violence against the political “left.”⁴
3 Additionally, KJZZ News reported that Phoenix public officials condemned the PPD’s
4 challenge coin for being a “hate message.”⁵

5 Then, on June 8, 2021, Sergeant McBride was added to the “Brady” list—which
6 tracks officers with histories of dishonesty, criminal actions, bias, and integrity
7 concerns—because he colluded with prosecutors in a criminal case against a protester to
8 present a grand jury with false information regarding a non-existent gang. This
9 designation led to an increased public interest in Sergeant McBride and his involvement
10 with the challenge coin.⁶

11 On August 12, 2021, the Phoenix City Manager issued a report summarizing
12 Ballard Spahr LLP’s findings that resulted from an in-depth investigation into the
13 challenge coin. *See City of Phoenix Challenge Coin Summary Report (Aug. 12, 2021) at*
14 *1.*⁷ The report made a number of findings, including that the phrase “GOOD NIGHT
15 LEFT NUT” has ties to hate speech, PPD officers understood “MAKING AMERICA
16 GREAT AGAIN” was partisan political speech relating to former President Trump’s
17 campaign, and the coin contained a “disrespectful image of a protester being shot in the
18
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20 ⁴ Vaughan Jones, *Phoenix Police ‘Challenge Coins’ Depict Violent Act From 2017*
21 *Protest*, KJZZ News (Feb. 7, 2021, 1:43 PM), [https://kjzz.org/content/1657148/phoenix-](https://kjzz.org/content/1657148/phoenix-police-challenge-coins-depict-violent-act-2017-protest)
22 *police-challenge-coins-depict-violent-act-2017-protest*; Ofer Aderet, *Right-Wing*
23 *Demonstrators in Tel Aviv Wore Neo-Nazi Shirts*, HAARETZ (Jul. 15, 2014),
<https://www.haaretz.com/.premium-israeli-rightists-wear-neo-nazi-garb-1.5255569>.

24 ⁵ Ron Dungan, *Phoenix City Officials Condemn Police ‘Challenge Coin’ Issued In Wake*
25 *Of Protest*, KJZZ News (Feb. 9, 2021, 9:05 AM),
[https://kjzz.org/content/1657506/phoenix-city-officials-condemn-police-challenge-coin-](https://kjzz.org/content/1657506/phoenix-city-officials-condemn-police-challenge-coin-issued-wake-protest)
26 *issued-wake-protest*.

27 ⁶ Dave Biscobing, *Phoenix PD Protest Team Leader Placed on ‘Brady’ List*, ABC15
(Jun. 18, 2021, 6:26 PM), [https://www.abc15.com/news/local-](https://www.abc15.com/news/local-news/investigations/protest-arrests/phoenix-pd-protest-team-leader-placed-on-brady-list)
28 *news/investigations/protest-arrests/phoenix-pd-protest-team-leader-placed-on-brady-list*.

⁷ Publicly accessible at [https://www.phoenix.gov/citymanagersite/Documents/Challenge-](https://www.phoenix.gov/citymanagersite/Documents/Challenge-Coin-Summary-Report-08-12-2021.pdf)
Coin-Summary-Report-08-12-2021.pdf.

1 groin by a Phoenix police officer.” *Id.* at 2. Exhibit 149 was specifically called-out in the
2 report and Sergeant McBride made comments specifically describing the contents of the
3 exhibit. *Id.* at 9-10, 15. The report further details PPD’s involvement in the creation,
4 circulation, and failure to investigate the challenge coin. *Id.* at 34-35.

5 Given recent public interest in the contents of Exhibit 149, Plaintiffs do not
6 believe that there are any compelling justifications for denying the public access to
7 Exhibit 149. Plaintiffs now move this Court to unseal Exhibit 149 and make it available
8 to the public.

9 10 **II. LEGAL STANDARD**

11 A change in public interest can necessitate that a Court unseal documents
12 previously filed under seal. *See Hunton v. Am. Zurich Ins. Co.*, No. CV-16-00539-PHX-
13 DLR, 2018 WL 6329392, at *4–5 (D. Ariz. Dec. 4, 2018) (finding that, regardless of the
14 parties’ stipulation and a prior court order to the contrary, “compelling reasons do not
15 justify maintaining confidentiality now” because “the public is, in fact, interested in
16 understanding this case” and the documents at issue were “important for the public to
17 fully understand the trial.”).

18 Courts apply a balancing test, beginning “with a strong presumption in favor of
19 access to court records, so a party seeking to seal a judicial record must overcome a
20 strong presumption in favor of access.” *Kamakana v. City & County of Honolulu*, 447
21 F.3d 1172, 1180 (9th Cir. 2006); *see also Getzen v. Winnies*, No. CV-2001748-PHX-SRB
22 (DMF), 2020 WL 8116188, at *8 (D. Ariz. Dec. 17, 2020), *appeal dismissed*, No. 21-
23 15072, 2021 WL 1511665 (9th Cir. Feb. 17, 2021) (citing *Nixon v. Warner Commc’ns,*
24 *Inc.*, 435 U.S. 589, 597 (1978)) (articulating the public right to inspect judicial documents
25 and records). To achieve this, a party seeking to seal must “articulate compelling reasons
26 supported by specific factual findings that outweigh the general history of access and the
27
28

1 public policies favoring disclosure.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d.
2 1122, 1135 (9th Cir. 2003).

3 The “compelling reasons” standard imposes a substantial burden. *See Kamakana*,
4 447 F.3d at 1178 (quoting *Foltz*, 331 F.3d. 1135). A protective order, which is obtained
5 “without making a particularized showing of good cause with respect to any individual
6 document,” does not entitle a party “to hold these records under seal forever.” *Jimenez v.*
7 *Progressive Cas. Ins. Co.*, No. CV-15-01187-PHX-ROS, 2019 WL 4885940, at *2 (D.
8 Ariz. Oct. 3, 2019) (citing *Foltz*, 331 F.3d at 1138).

10 **III. ARGUMENT**

11 This Court should unseal Exhibit 149 given recent public interest in the challenge
12 coin and Sergeant McBride. Defendants’ sole basis for maintaining the exhibit under seal
13 is their belief that Exhibit 149 “contains private personal information,” which Defendants
14 claimed is sealable pursuant to the Protective Order. If that were ever the case, it is no
15 longer true.

16 “[C]ompelling reasons’ sufficient to outweigh the public’s interest in disclosure
17 exist when court records might ‘become a vehicle for improper purposes,’ such as the use
18 of records to gratify private spite, promote public scandal, circulate libelous statements,
19 or release trade secrets.” *Kamakana*, 447 F.3d at 1179 (quoting *Nixon*, 435 U.S. 589,
20 598). But “[t]he mere fact that the production of records may lead to a litigant’s
21 embarrassment, incrimination, or exposure to further litigation will not, without more,
22 compel the court to seal its records.” *Id.*

23 Defendants bear a substantial burden to override the strong public interest in
24 accessing Exhibit 149. Since May 2020—when Exhibit 149 was filed under seal—
25 ABC15 and KJZZ have reported on the challenge coin’s appearance, posted photographs
26 of the coin that match those in Exhibit 149, and commented on the phrase “GOOD
27 NIGHT LEFT NUT” and its resemblance to neo-Nazi phrase “Good Night, Left Side.”
28 KJZZ reported that Phoenix public officials expressly condemned the PPD challenge coin

1 as a “hate message.” Now, the Phoenix City Manager has published an investigation that
2 makes specific findings about the challenge coin, explicitly discusses Exhibit 149, and
3 provides information from Sergeant McBride about the exhibit.

4 Defendants sole reason to prevent Exhibit 149 from public disclosure is that it
5 “contains private personal information.” This is not a compelling reason sufficient to
6 outweigh public policy favoring disclosure. Defendants cannot show how Exhibit 149
7 relates to any of the compelling reasons articulated in *Kamakana* or other caselaw.

8 **IV. CONCLUSION**

9 For all the foregoing reasons, Plaintiffs request that the Court unseal Exhibit 149.

10 RESPECTFULLY SUBMITTED this 3rd day of September, 2021.

11
12 /s/ Kathleen E. Brody

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CERTIFICATE OF SERVICE

I certify that on September 3, 2021, I electronically transmitted a PDF version of the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants:

/s/ Kathleen E. Brody